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SUPREME COURT OF THE UNITED STATES

No. 278

October Term, 1958

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, HARRY NEEDELMAN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 14, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals (infra Appendix A, pages App. 1 through App. 9) is reported at 261 F. 2d 802. No written opinion was delivered in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1958 (infra Appendix B, page App. 10-11. An Order denying petition for rehearing was entered by the Court of Appeals on July 6, 1959 (infra Appendix C, page App. 12-13). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). The basis for federal jurisdiction in the Court of First Instance was 26 U.S.C. §4705(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are as follows:

1. 18 U.S.C. §3500, as set forth hereinafter in Appendix D, page App. 14-15.

2. The sixth Amendment to the Constitution of the United States, as set forth hereinafter in Appendix D, page App. 16.

STATEMENT OF THE CASE

The petitioner, a physician, and a druggist were first tried on an indictment for conspiracy to violate 26 U.S.C. 4705(a). A mistrial resulted. Subsequently another indictment was returned against the petitioner alone charging him with substantive violations of 26 U.S.C. 4705 (a). The two cases were consolidated for trial.

After the mistrial on the conspiracy charge but

prior to the consolidated trial the petitioner moved the court:

> " . . . for an Order permitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified in said cause and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by the said Rudd are material and necessary for the defendants to prepare their defense."

The motion was denied. Again, after the narcotic agent, Rudd, had testified at the consolidated trial on direct examination, had been cross-examined by petitioner's counsel and was on re-direct examination by the government, a short recess was had and the court ruled:

> "I will deny the request for the notes because they may involve many things. You may see the case report." (**infra**, Appendix A, page App. 4.)

The narcotic agent Rudd testified as to conversations with the petitioner wherein the petitioner stated, accord-

ing to Rudd, that the petitioner knew that certain patients who obtained prescriptions for narcotics were narcotic addicts. The petitioner denied making any such statements.

At the close of the government's case a motion for judgment of acquittal was granted as to both defendants on the conspiracy charge, but petitioner's motion for judgment of acquittal on the substantive charges was denied. At the conclusion of all the evidence the petitioner again moved for judgment of acquittal, which motion was denied by the trial court with the statement:

> "I think this is a very slender case, off-hand, but I think there is enough to go to the jury."

The jury returned a verdict of guilty as to each of the fifteen substantive counts. The trial court thereafter granted a motion for new trial as to five counts of the indictment and those counts, upon motion of the government, were dismissed by the court. The court fined the petitioner the total of $5,000 and placed him on probation for three years.

The petitioner filed his notice of appeal from the judgment of conviction in the Court of Appeals for the Fifth Circuit. On November 14, 1958 the Court of Appeals for the Fifth Circuit affirmed the judgment of conviction. Circuit Judge Rives wrote the opinion which was concurred in by Circuit Judges Tuttle and Jones. A petition for rehearing was denied on July 6, 1959.

QUESTIONS PRESENTED

1. WHERE A DEFENDANT IN A CRIMINAL PROSECUTION, AT THE BEGINNING OF THE TRIAL AND ALSO WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, MOVES FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING, TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF SUCH NOTES AND MEMORANDA CONSTITUTE A PREJUDICIAL DENIAL TO DEFENDANT OF THE PROCEDURES PROVIDED FOR IN 18 U.S.C. §3500?

2. WHETHER THE RULE ANNOUNCED BY THIS COURT IN GOLDMAN V. U.S., 1942, 316 U.S. 129, 132, 62 S. Ct. 993, 995, 86 L. Ed. 1322, TO THE EFFECT THAT A TRIAL JUDGE HAS THE DISCRETION TO DENY A DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO INSPECT NOTES AND MEMORANDA MADE BY A GOVERNMENT AGENT DURING HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT TO REFRESH HIS RECOLLECTION BEFORE TESTIFYING AS A WITNESS FOR THE GOVER'-

MENT, HAS BEEN OVERRULED BY THIS COURT IN JENCKS V. U.S., 1957, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, and BY THE STATUTE, 18 U.S.C. §3500.

3. WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION UPON THE SOLE BASIS THAT SUCH NOTES "MAY" INVOLVE MANY THINGS CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS BEHALF UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY WHERE THE TRIAL COURT RECOGNIZES THAT THE GOVERNMENT'S CASE IS A "VERY SLENDER CASE."

4. WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMO-

RANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH AN INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF SUCH NOTES AND MEMORANDA TO APPRAISE THE POSSIBLE USE THE DEFENDANT COULD MAKE OF SUCH DOCUMENTS FOR IMPEACHMENT OR OTHER EVIDENTIARY PURPOSES CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fifth Circuit in the instant case was:

1. That contemporaneous notes and memoranda prepared by a government agent during the course of his investigation and used by him before testifying to refresh his recollection are not within the scope of 18 U.S.C. §3500.

2. That the rule of **Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it is discretionary with the trial court to require or not to require a witness to produce contemporanous memoranda

or notes from which he had refreshed his recollection before taking the stand was not overruled by **Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103.**

3. That there was no abuse of discretion by the trial court in denying permission to examine such notes and memoranda of the government agent.

The Petition for Writ of Certiorari should be granted for the following reasons:

I.

A. In deciding that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500, the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

In **Palermo v. United States, No. 471, October Term 1958, decided June 22, 1959 (not yet reported)**, and in **Lev v. United States, Wool v. United States**, and **Rubin v. United States, Nos. 435, 436, 437, October Term 1958, decided June 22, 1959 (not yet reported)**, this Court considered the production under 18 U.S.C. §3500 of statements made by a government witness to an agent of the government. **Pittsburgh Plate Glass Co. v. United States, No. 489, October Term 1958, and Galax Mirror Co., Inc. v. United States, No. 491, October Term 1958, decided June 22, 1959 and not yet reported**, concerned production of a witness' prior testimony before a grand jury. This Court has not passed upon the question as to whether or not 18 U.S.C.

§3500 encompasses contemporaneous notes and memoranda prepared by a government agent during his investigation and used by him to refresh his recollection prior to testifying. To be sure, counsel for defendants in criminal cases have attempted in the past to obtain the investigative notes and reports of government agents and undoubtedly will attempt to do so in the future. The extent to which defense counsel is entitled under 18 U.S.C. §3500 to such contemporaneous notes and memoranda when the government agent takes the stand to testify against a defendant is an important question of federal law, the immediate clarification of which will aid counsel and the courts in the proper administration of criminal law and procedure.

The Court of Appeals for the Fifth Circuit has decided in the instant case that contemporaneous notes and memoranda made by a government agent during the course of his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500. The petitioner respectfully submits that such decision is manifestly contrary to the specific wording and intent of 18 U.S.C. §3500.

Sub-section (a), 18 U.S.C. §3500, deals solely with statements made by a government witness to a government agent, which situation is not present in the case at bar. However, sub-section (b) of 18 U.S.C. §3500, does cover the situation of the case at bar, that is, where the government agent is the witness who is testifying. Subsection (b) provides:

> "(b) After a witness, called by the United States, has testified on direct examination, the court

> shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified . . ."

The government agent, Rudd, was called as a witness by the United States in the instant case. He had testified on direct, cross, and re-direct when the motion of the defendant for production of his contemporaneous notes and memoranda was denied. The only remaining question is whether the notes and memoranda of Rudd constituted a "statement" under the definition contained in sub-section (e) of 18 U.S.C. §3500. Sub-section (e) of 18 U.S.C. §3500 provides:

> "(e) The term 'statement' . . . means (1) a written statement made by said witness and signed or otherwise adopted or approved by him."

The notes and memoranda of Rudd used by him met all the requirements of sub-section (e)(1). The notes were written, were made by the witness, and were certainly adopted or approved by him by the very act of using such notes to refresh his recollection before testifying concerning the events which he recorded in his notes. The petitioner submits that the notes and memoranda of Rudd met every requirement of 18 U.S.C. §3500 and that the determination by the Court of Appeals that such notes are not within the scope of 18 U.S.C. §3500 cannot be upheld.

The production of notes of a government agent in a situation similar to the case at bar was discussed during oral arguments before this Court in the cases of Lev v.

United States, Wool v. United States, and **Rubin v. United States, supra.** A portion of the discussion between various members of this Court and Mr. Oscar Davis, First Assistant to the Solicitor General, as reported in 27 Law Week at page 3308, was as follows:

> "In many instances, the Assistant to the Solicitor General continued, the face of the document shows it is not producible. There may be a three-hour interview with a fifty-line summary.
>
> "Mr. Justice Brennan: 'Suppose here there had been a statement "I talked with Carlin, but he denied knowledge of this transaction," and subsequently the witness testifies. Would that be producible?'
>
> "Mr. Davis: 'No.'
>
> "Mr. Davis asserted that counsel could cross-examine the witness as to what he said or cross-examine the agent.
>
> "Mr. Justice Black: 'Suppose the agent denies it?"
>
> "Mr. Davis: **'Then the memorandum could be produced, since it was the agent's own document and would be producible.'** " (emphasis added)

The statement made by the First Assistant to the Solicitor General is precisely the contention of the petitioner. In the case at bar the memoranda was the agent Rudd's own document and was producible. Rudd prepared

the memoranda. Rudd used the memoranda to refresh his recollection. It was his own document and could properly be used to impeach his testimony. The letter, as well as the intent, of 18 U.S.C. §3500 requires production of such memoranda. In argument upon **Palermo v. United States, supra,** government counsel again suggested the remedy of calling the interviewing agent, apparently as a means of obtaining production of the agent's memoranda of an interview with a witness (see footnote (1) to the concurring opinion of Mr. Justice Brennan).

Thus, the unusual situation is presented where government counsel admits before this Court that notes and memoranda of a government agent are producible where the agent testifies, but the Court of Appeals for the Fifth Circuit rules that such notes are not producible. This important question of federal law should be settled by this Court.

The prejudicial effect of the denial of production of Rudd's notes is apparent. The government's case was a very slender one as recognized by the trial court. The primary issue in the case was the good faith of the petitioner in prescribing narcotics for certain persons. Rudd testified that the petitioner had stated to him that petitioner knew that those certain persons were narcotic addicts. The petitioner denied making such statements (**infra,** Appendix A, page App. 8). The impeachment of Rudd's testimony was of vital importance and any inconsistency between Rudd's testimony and the notes made during his investigation could well have resulted in swaying this very slender case to the petitioner's favor.

B. In deciding that notes and memoranda prepared

by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500, the Court of Appeals for the Fifth Circuit decided such federal question in a way in conflict with the decision of this Court in **Palermo v. United States, No. 471, October Term 1958, decided June 22, 1959** (not yet reported).

The Court of Appeals, in deciding that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500, predicated its decision upon two premises, both of which premises this Court rejected in **Palermo v. United States, supra.** The Court of Appeals determined that the notes of Rudd were not within 18 U.S.C. §3500 because:

(1) 18 U.S.C. §3500 relates to *formal* written statements or reports made by the witness and signed or otherwise adopted or approved by him, and

(2) such memoranda or notes could not be directly introduced for impeachment purposes, but might be used as a basis for cross-examining the witness.

The *formality* of a written statement is no criteria of whether it should be produced under 18 U.S.C. §3500. As stated by this Court in **Palermo v. United States, supra**:

> **"We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements."**

Thus, the restriction by the Court of Appeals of 18 U.S.C. §3500 to *formal* written statements is not in accord

with the decision of this Court in **Palermo v. United States, supra.**

Likewise, the admissibilty in evidence of a statement sought to be produced is of no importance in determining whether the statement should be produced under 18 U.S.C. §3500. As stated by Mr. Justice Frankfurter in **Palermo v. United States, supra:**

> "The statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced."

And, as stated by Mr. Justice Brennan in **Palermo v. United States, supra,**

> "The statute is to be given a reasonable construction and the courts must not lose sight of the fact that the statute regulates *production* of material for possible use in cross examination, and does not regulate *admissibility* into evidence — as the Court properly observes."

The Court of Appeals decided that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of 18 U.S.C. §3500. In predicating its decision upon a lack of formality of the statement and its inadmissibility into evidence, the Court of Appeals has decided a federal question in a way in conflict with the decision of this Court in **Palermo v. United States, supra.**

II.

A. In deciding that the rule in **Goldman v. U.S., 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it

is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand, was not overruled by **Jencks v. U.S., 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103**, the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Second Circuit in the case of **National Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403.**

The Court of Appeals for the Fifth Circuit ruled in the instant case that the case of **Goldman v. United States, supra,** was not overruled by **Jencks v. United States, supra,** and that, therefore, it was discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand. The Court of Appeals for the Second Circuit has ruled exactly to the contrary in **National Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403.** In that case, the Court of Appeals for the Second Circuit considered the question as to whether a statement admittedly used by a witness to refresh his recollection shortly prior to testifying at an administrative hearing must be produced on demand by counsel for the purposes of cross-examination. The Court of Appeals for the Second Circuit, after discussing **Goldman v. United States, supra,** ruled that under **Jencks v. United States, supra,** such statement must be produced. The Second Circuit further decided that such rule would apply in an administrative hearing as well as in a criminal trial.

Thus there exists a direct conflict between two circuits on a point of law. The Fifth Circuit holds that **Gold-**

man v. United States, supra, is still the law and that the trial court has the discretion to deny production of memoranda used by a witness to refresh his recollection prior to testifying. The Second Circuit takes the view that **Goldman v. United States, supra,** was overruled by **Jencks v. United States, supra,** and that production of such memoranda must be required. This contrariety of views between circuits should be settled by this Court.

B. In deciding that the rule in **Goldman v. U. S., 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand, was not overruled by **Jencks v. U. S., 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103,** the Court of Appeals for the Fifth Circuit decided an important question of federal law which has not been, but should be, settled by this Court.

What is the rule of law which governs the production and inspection of notes made by a government agent during his investigation and used by him to refresh his recollection before testifying? **Goldman v. United States, supra,** states that the trial court has discretion to deny such production. **Jencks v. United States, supra,** appears to overrule **Goldman v. United States** and requires production. Mr. Justice Clark, in his dissent in **Jencks,** states that **Goldman** is not overruled by **Jencks** but "is left on the books to haunt lawyers and trial courts in their search for the proper rule." **Jencks v. United States, 353 U.S. 657, at 680.** The Court of Appeals for the Fifth Circuit says, in the instant case, that **Goldman** is not overruled by **Jencks.** The Second Circuit says, in **National**

Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403, that **Jencks** not **Goldman** states the proper rule. The provisions of 18 U.S.C. §3500 appear to cover the production of such notes and would therefore supersede the rule of **Goldman.** But the Fifth Circuit has ruled in the instant case that such notes are not within the scope of 18 U.S.C. §3500.

In the midst of such a divergence of views one point is exceedingly clear; that is, that a definitive statement by this Court as to the rule of law governing production and inspection of such notes is essential. This is a matter of the everyday practice of law in the federal courts, and a matter which can present itself in every instance where a government agent takes the witness stand. The petitioner respectfully urges the court to settle this important question of federal law by stating the rule of law which should be applied.

III.

In deciding that there was no abuse of discretion by the trial court in denying the motion of the defendant for production and inspection of the contemporaneous notes and memoranda prepared by a government agent during the course of his investigation and used by him to refresh his recollection before testifying, the Court of Appeals sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The trial court denied the motion of the petitioner for production of notes and memoranda made by a govern-

ment agent during the course of his investigation and used by him to refresh his recollection before testifying, without any examination by the trial court of the notes and memoranda and solely "because they may involve many things." The Court of Appeals, in ruling that such action by the trial court did not constitute an abuse of discretion, sanctioned a departure from the accepted and usual course of judicial proceedings which endangers the constitutional rights of all defendants in criminal cases.

As stated in **United States v. Schneiderman, 106, F. Supp. 731, 735, 736:**

> "The court's discretionary power to compel production of a document must be exercised in the light of the requirement of the 6th Amendment that:
>
> > 'In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .' (U.S. Const., Amend. VI) . . .
>
> "Proper exercise of judicial discretion in determining whether to compel production requires in every case that any public policy militating against public disclosure of the document be weighed against the interests of the accused in having the document for use in making a defense to the charge."

In exercising their discretionary power in the past, the courts adopted the procedure of an *in camera* inspection of the documents in order to weigh public policy

against the interests of the accused (see cases cited in **Jencks v. United States, supra, at page 676, footnote 4).** This procedure was disapproved in **Jencks v. United States, supra.** The statute, 18 U.S.C. §3500 provided a method for the excising by the trial court of portions of a document which the trial court feels should not be revealed to the defendant. In any event, the courts have ever been diligent to preserve constitutional rights of defendants under the Sixth Amendment and to deny production of relevant documents to them only where the possible evidentiary value of the document to the defendant was outweighed by some public policy against disclosure. The discretion exercised by the courts was the discretion of deciding, **after examining the document,** whether the interests of the defendant or the public were paramount.

It is the position of the petitioner that the notes in question are within the scope of 18 U.S.C. §3500 and that the procedures therein prescribed should have been followed. But 18 U.S.C. §3500 is at most a procedural method for protecting the interest of the government without infringing the constitutional rights of defendants under the Sixth Amendment. The trial court in the instant case not only did not follow the statutory procedures of 18 U.S.C. §3500 but also denied to the petitioner the minimal right which has always been accorded under the Sixth Amendment; that is, the right to have the trial court, at the very least, order production of the notes for examination by the trial court in order that the trial court might weigh the evidentiary value of the document as against reasons for not disclosing the document in the interests of the public welfare or safety.

The petitioner respectfully submits that the opinion

of the Court of Appeals in the instant case cannot be permitted to remain on the law books as precedent for such a denial to a defendant of all rights under the Sixth Amendment.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit compounds the uncertainty as to the rule of law which governs the production of notes made by a government agent during his investigation and used by him to refresh his recollection before testifying. A decision by this Court as to whether such notes are encompassed in 18 U.S.C. §3500 and as to whether the rule in **Goldman v. United States, supra,** is of any present force or effect, is essential for the guidance of trial courts and lawyers in their efforts to afford to every defendant the full measure of his right under the Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington 25, D.C. this 30th day August, 1959 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D.C.

I FURTHER CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was personally delivered to Helen Wanick, a clerk in the office of James L. Guilmartin, United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this 31st day of August, 1959.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17,022

HARRY NEEDLEMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 14, 1958.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge: The appellant, a physician, and Walter Waxman, a druggist, were first tried on an indictment for conspiracy to violate Title 26, United States Code, Section 4705(a), that is, to sell certain narcotic drugs, to wit, codeine, methadon, and demerol, not in pursuance of the required written orders. The result was a mistrial.

Subsequently, another indictment containing fifteen counts was returned against the appellant alone, charging him with substantive violations of the said Section. The first five counts named Gerald Miller, the next five counts named Fidele Garcia, and the last five counts named Alice Buonaiuto as the persons to whom methodon was sold or caused to be sold. Except for the names of such persons and the dates of sale, all fifteen counts were identical.

Without objection, the two cases were consolidated for trial. At the conclusion of the Government's evidence, the court granted a motion for judgment of acquittal of both Defendants on the conspiracy charged, but denied Dr. Needelman's like motion on the substantive counts. The court then sustained Dr. Needleman's motion to strike all of the testimony of conversations had between the narcotic agent and Waxman outside the presence of Dr. Needelman and directed the jury to disregard any such testimony. The government offered no additional evidence, but Dr. Needelman introduced a number of witnesses and testified in his own behalf.

At the conclusion of all the evidence, Dr. Needelman again moved for judgment of acquittal. The court denied the motion, stating in the jury's absence from the courtroom, "I think this is a very slender case, offhand, but I think there is enough to go to the jury."

The jury returned a verdict of guilty as to each of the fifteen counts. The court thereafter granted a motion for new trial as to the last five counts which named Alice Buonaiuto as the purchaser; and those counts, upon motion of the Government, were dismissed by the court. The

court fined the appellant a total of $5,000.00 and placed him on probation for three years.[1]

After the mistrial on the conspiracy charge, but prior to the time of the consolidated trial, the appellant moved the court:

> ". . . for an Order permitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who has previously testified in said cause and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by said Rudd are material and necessary for the defendants to prepare their defense."

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[1] At the time of sentencing, the Judge stated:

"The Medical Association may or may not deprive him of his license. I hope they don't. I hope they think he should not be deprived of his license because undoubtedly he is a skilful Doctor. I don't know. I am not going to go back on the jury's verdict, but I personally feel that he was exceedingly careless in any event, and it is possible that the jury felt that way and found him guilty for that reason. I don't know. They shouldn't have on that basis, but being human beings they might have done so."

The motion was denied. Again, after the narcotic agent Rudd had testified on direct examination on the second trial, had been cross-examined by appellant's counsel, and was on redirect examination by the Government, a short recess was had, the jury retired from the courtroom, and, we assume in response to a renewal of the motion, the court ruled: "I will deny the request for the notes, because they may involve many things. You may see the case report."

The questions presented for decision on appeal are whether the court erred in denying the defendant's motion for judgment of acquittal, and whether the court erred in denying the defendant's motion to be allowed to inspect the contemporaneous notes made by narcotic agent Rudd.

The issue of guilt or innocence was primarily that of good faith, that is, whether in good faith the narcotic drugs were dispensed by the defendant as a physician to his patients "in the course of his professional practice only."[2]

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[2] 26 U.S.C.A. §4705(c). The applicable subsections read:

"(a) General requirement.—It shall be unlawful for any person to sell barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

. . .

"(c) Other exceptions.—Nothing contained in this section, section 4735, or section 4774 shall apply—

"(1) Use of drugs in professional practice.—To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection as provided in section 4773."

The theory of the Government's case was that the prescriptions to the three persons named in the indictment were not issued for the relief of pain but to keep narcotic addicts comfortable. In its oral charge to the jury, the court defined the issue as follows:

> "Good faith is a matter for your determination, whether or not he did act in good faith; and good faith means that he has got to act in an honest endeavor to carry on his profession. Now, if he made a mistake or he was foolish or inept or something like that, that wouldn't be a breach of good faith; but if he sold drugs to an addict, a known man, having good reason to know a man or woman to be an addict, and sold only for the principal purpose of supplying the addict with these drugs that he craved, that would not, of course, be in good faith.
>
> "So, as both attorneys have told you, the issue in this case is good faith. Did Dr. Needleman act in good faith in issuing these prescriptions?"

The appellant does not question the settled proposition of law that in order for a physician to come within the exception to the statute, 26 U.S.C.A. 4705 (c), note 2, supra, the narcotic drugs must have been dispensed or distributed to a patient or patients by the physician in good faith in the course of his professional practice only.[3]

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[3] See *McBride v. United States*, 5th Cir. 1955, 225 F. 2d 249, 253, construing Section 2554 of the 1939 Internal Revenue Code which is substantially the same as Section 4705 of the 1954 Internal Revenue Code. See also *Linder v. United States*, 1925, 268 U.S. 5.

In reviewing the denial of the motion for judgment of acquittal, the evidence must be considered in the light most favorable to the government.[4] So considered, the jury could reasonably find the following facts. Dr. Needelman was to leave for Europe on August 6, 1955, for an extended vacation. He had known a Dr. Szekely, who had practiced medicine in New York for a considerable number of years, had taken the Florida Medical Board examination, and was awaiting his certificate to practice in Florida. Dr. Szekely came to Dr. Needelman's office about a week prior to Dr. Needelman's departure to become acquainted with Dr. Needelman's patients. Dr. Szekely's Florida certificate did not arrive by time Dr. Needelman was to leave, so Dr. Needelman made arrangements with Dr. Grier, a licensed physician with a Government narcotic license, to take charge of the office until Dr. Szekely received his certificate. On August 20, two weeks after Dr. Needelman's departure, Dr. Szekely's license to practice medicine in Florida was issued. All of the questioned prescriptions were delivered to the patients after Dr. Needelman had left on his vacation, but peculiarly neither Dr. Szekely nor Dr. Grier was called as a witness.

It was stipulated that codeine, demerol, and methadon are narcotic drugs as defined in Title 26, United States Code, Section 4731. Miss Sally Rossman testified that she was employed by Dr. Needelman from June 1955 through November 1955 doing laboratory work, assisting the Doctor and covering the front desk when needed. She identified thirty-one prescriptions which Dr. Needelman signed and left with her and Miss Fredericks, the other

[4] Mortensen v. United States, 1944, 322 U.S. 369, 374; Glasser v. United States, 1942, 315 U.S. 60, 80; Lloyd v. United States, 5 Cir. 1955, 226 F. 2d 9, 13; Vick v. United States, 5th Cir. 1954, 216 F. 2d 228.

nurse in the office, with instructions that they were to be kept locked in a drawer of a desk, and when the patients whose names appeared on the prescriptions came in and paid a prescribed fee, varying from five to ten dollars, a prescription was to be delivered to the patient. At the time of delivery, she would fill in on the prescription that date as the date on which it was "to be filled". Those three words were written by her at Dr. Needelman's direction prior to his departure. Among such patients were the three named in the indictment. Miss Rossman was extensively cross-examined in an effort to show that the prescriptions were delivered only at the direction of Dr. Szekely or Dr. Gr r, and did waiver somewhat in her testimony. The jury, however, could have reasonably believed that payment of the required fee was all that was necessary for a patient to receive a prescription for narcotic drugs signed by Dr. Needelman.

Miss Lillian Fredericks, the other nurse who had worked in Dr. Needelman's office, identified some twenty-nine additional prescriptions for narcotic drugs signed by Dr. Needelman and which bore her handwriting as to the dates on which they were to be filled. In general, her testimony was similar to that of Miss Rossman.

In addition, Dr. Needelman had left at the Medical Arts Pharmacy, of which Walter Waxman was proprietor, some seventy-five signed prescriptions for narcotic drugs, some to be delivered to Abe Bruches and some to his wife, Lottie Bruches. As each prescription was delivered, $2.50 would be collected and retained for Dr. Needelman, purportedly, however, to apply on an old bill owed by the Bruches to Dr. Needelman rather than for the prescriptions themselves.

Narcotic agents Rudd and Waters testified to examining the narcotic prescription file at the Medical Arts Pharmacy on September 22, 1955, just after Dr. Needelman's return from Europe, and to interviewing Dr. Needelman. Each testified that, after being warned and informed as to his rights not to give incriminating evidence against himself, Dr. Needelman talked freely, and stated that he knew the patients in question were narcotic addicts and that the $175.00 left at the drug store by the Bruches was for prescriptions left there by Dr. Needelman at the rate of $2.50.

Dr. Needelman denied having made any such admissions, and testified and introduced evidence tending to show that the patients were suffering pain and that the prescriptions were signed and left by him in the course of his professional practice only. There was additional evidence on either side of the issue. Enough has been recited, however, to demonstrate that, considered in the light most favorable to the Government, there was sufficient relevant evidence from which the jury could reasonably have believed beyond a reasonable doubt that Dr. Needelman did not in good faith dispense or distribute the narcotic drugs to patients in the course of his professional practice only. The motion for judgment of acquittal was therefore properly denied.

Narcotic agent Rudd did not use his memoranda or notes to refresh his recollection while testifying, but admitted that he refreshed his recollection from them before testifying. Such memoranda or notes made contemporaneously by the witness for the purpose of refreshing his own recollection are not strictly within the rule of **Jencks v. United States**, 1957, 353 U.S. 657, or of the sta-

tute passed to meet that decision, 18 United States Code §3500, which relate to formal written statements or reports made by the witness and signed or otherwise adopted or approved by him. Unlike such statements or reports, the mere memoranda or notes could not be directly introduced for impeachment purposes, but might be used as a basis for cross-examining the witness. The case of **Goldman v. United States,** 1942, 316 U.S. 129, holding that it is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand, was not overruled by **Jencks, supra.**[5] In our opinion, there was no abuse of discretion in denying permission to examine Rudd's memoranda or notes, but permitting appellant's counsel to see the case report.

Finding no reversible error in the record, the judgment is

AFFIRMED.

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[5] See our recent opinion of Lambert v. United States, No. 17,143, 5th Cir. 1958, ... F. 2d ..... See also, Jencks v. United States, 1957, 353 U.S. 657, at pages 668, 674, 680.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1959

No. 17,022

D. C. Docket No. 10,348-M-Criminal

HARRY NEEDELMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RIVES, TUTTLE and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 14, 1958.

A true copy
Test:

s/ Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

Jul 23 1959

APPENDIX C

(Original Filed: July 6, 1959)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17,022

HARRY NEEDELMAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(JULY 6, 1959)

ON PETITION FOR REHEARING

Before RIVES, TUTTLE and JONES, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above styled and numbered cause is hereby

DENIED.

A true copy
Test:

s/ EDWARD W. WADSWORTH
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

JUL 23 1959

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall ex-

cise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said wit-

ness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

CONSTITUTION OF THE UNITED STATES AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.